NO. 79-538

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

MAMMOTH BULK CARRIERS, LTD.,

Petitioner,

v.

JAMES D. BACHTEL, DONNA BACHTEL AND TWIN HARBOR STEVEDORING CO.,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

	Page
Opinion Below.	1
Questions Presented.	1
Statement of the Case.	2
Reasons for Denying the Writ	4
Procedural Deficiencies.	5
A. Federal Rule of Civil Procedure 50 . .	5
B. OSHA Regulations	10
Conclusion	12

TABLES OF AUTHORITY
Table of Cases

DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193 (3d Cir. 1978). 7,8-9

Jack Cole Company v. Hudson, 409 F.2d 188 (5th Cir. 1969. 7

Johnson v. A/S Ivarans Rederi, (1st Cir. Jan. 11, 1979) No. 79-1118. 13

Kemarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959). 13

Martinez Moll v. Levitt & Sons of Puerto Rico, Inc., 583 F.2d 565 (1st Cir. 1978) 7-8

Oliveras v. American Export Isbrandtsen Lines, Inc., 431 F.2d 814 (2d Cir. 1970). 7,8,9

Provenza v. American Export Lines, Inc., 324 F.2d 660 (4th Cir. 1963) 11

Santos v. Scindia Steam Navigation Co., 598 F.2d 480 (9th Cir. 1979) 13

Smith v. American Guild of Variety Artists, 368 F.2d 511 (8th Cir. 19__) 12

Trailmobile v. Whirls, 331 U.S. 40, 67 S. Ct. 982, 91 L. Ed. 1328 (19__) 12

Constitutional Provisions

U.S. Const. amend VII. 8

Statutes

33 U.S.C. § 905(b) 2

Other Authority

29 C.F.R. 1918.2 11

Federal Rule of Civil Procedure 50(b). 2,3,4,5-6,7,8

Moore's Federal Practice § 50.02[1]. 6,7

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OPINION BELOW

There was no opinion in the district court. The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 605 F.2d 438.

QUESTIONS PRESENTED

1. Does this Court have jurisdiction to review an assignment of error grounded upon a denial of a motion for a judgment notwithstanding the verdict where petitioner failed to renew its

motion for a directed verdict at the close of all evidence, as required by Rule 50(b)?

2. Did the Ninth Circuit err in adopting a standard of care under 33 U.S.C. § 905(b), which subjects a vessel to liability for injuries to a longshoreman arising out of a condition on the vessel, where the shipowner knows or in the exercise of reasonable care would discover, the condition, and should realize that it involves an unreasonable risk of harm and fails to exercise reasonable care under the circumstances to protect the longshoreman against the danger?

3. Did the Ninth Circuit err in holding that OSHA Regulations are applicable to shipowners as a standard of care and may go to the jury with all other evidence bearing on the issue of liability?

STATEMENT OF THE CASE

The outline of the facts of this case as well as the procedural background are well stated by the Ninth Circuit in its opinion at 605 F.2d 438-441, with the following exceptions:

The Ninth Circuit concluded that the district court had "jurisdiction to pass on the sufficiency of the evidence under Rule 50(b) even though there was no motion for a directed verdict as required by the Rule". (605 F.2d 442). The court reasoned that the motion for a directed verdict at the close of plaintiff's case, coupled with a proposed instruction for a directed verdict, "placed the issue of the sufficiency of the evidence directly before the court". The court ignored, however, petitioner's failure to except to the trial court's failure to give its proposed Instruction 3 for a directed verdict.

The opinion of the court also does not make clear that the petitioner (shipowner) offered into evidence, exhibit A-14, a copy of the OSHA Regulations applicable to longshore operations. The OSHA Regulations were admitted into evidence by agreement of the parties. Petitioner proposed no instructions concerning the OSHA Regulations. Petitioner objected to the court's Instruction 14

regarding OSHA Regulations but did not raise brief or argue the propriety of court Instruction 14 in its opening brief to the Ninth Circuit. Petitioner in its assignment of error below referred only to court's Instruction 4, which was the contention of plaintiffs regarding OSHA Regulations.

REASONS FOR DENYING THE WRIT

1. The trial court, the Ninth Circuit and the Supreme Court lack jurisdiction to entertain a motion for judgment notwithstanding the verdict, or an appeal from the denial of such motion, due to petitioner's failure to move for a directed verdict at the close of all the evidence as required by Federal Rule of Civil Procedure 50(b).

2. Petitioner failed to object or except to the trial court's instruction on the issue of negligence and OSHA Regulations or having objected failed to assign error, brief or argue such claimed error in its opening brief, and therefore waived all such claimed error.

PROCEDURAL DEFICIENCIES

A. Federal Rule of Civil Procedure 50

The applicable portions of Federal Rule of Civil Procedure provide:

> MOTION FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT
>
> (a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.
>
> (b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject ot a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a

> directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requrested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Defendant moved for a directed verdict at the close of plaintiff's case. This motion challenged the sufficiency of the evidence. The trial court was requested to consider the evidence in the strongest light in favor of plaintiff, and could only grant the motion if the evidence and all reasonable inferences therefrom could not sustain a verdict. Moore's Federal Practice § 50.02[1] (citing numerous cases). Since at the time the motion was made defendant-appellant had put on part of its case, it is clear that the court could consider all the evidence no matter who offered it. Moore's Federal Practice, supra, at 50-38. The

court denied the motion and the defendant elected to put on the rest of its case.

It has long been established that by going ahead with its evidence, petitioner waived its motion for a directed verdict, the effect of which is: (1) The motion cannot serve as the necessary predicate for a motion for judgment under Rule 50(b); and (2) it cannot serve as the basis for attacking the sufficiency of the evidence in the appellate court. Moore's Federal Practice, § 50.05 at 50-54 to 50-57.

The Ninth Circuit equated the petitioner's requested instruction for a directed verdict as equivalent to the required motion, notwithstanding petitioner's failure to except to the court's refusal to give the instruction. The court relied on Oliveras v. American Export Isbrandtsen Lines, Inc., 431 F.2d 814 (2d Cir. 1970) and Jack Cole Company v. Hudson, 409 F.2d 188 (5th Cir. 1969) and rejected DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193 (3d Cir. 1978) and Martinez Moll

v. Levitt & Sons of Puerto Rico, Inc., 583 F.2d 565 (1st Cir. 1978). We suggest that the court's reliance on Oliveras is misplaced and the better and sounder rule is followed in DeMarines and Martinez Moll.

The purpose of Rule 50(b) is to call to the court's attention and to opposing counsel the challenge to the sufficiency of the evidence prior to the case being submitted to the jury ". . . so that his opponent may possibly cure any deficiency in his case should the motion have merit and also so that the judge may rule on the adequacy of evidence without impinging on the jury's fact-finding province. . . ", Martinez Moll, supra at 569 (emphasis added).

Strict construction of Rule 50(b) is necessary to preserve the integrity of the jury verdict under the Seventh Amendment.

> Fed. R. Civ. P. 50(b) requires a party to make a motion for directed verdict after presentation of all the evidence as a condition precedent to obtaining judgment n.o.v. This condition preserves for the trial court, as a question of law, the sufficiency of the

> evidence and allows the court an opportunity, on a motion for judgment n.o.v. to pass on the strictly legal question. Without preservation of objection to sufficiency, the trial court would be asked "to re-examine the facts already tried by the jury, and this the court may not do without violating the Seventh Amendment".

DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193, 1195 fn. 4 (3d Cir. 1978).

To promote the orderly administration of justice, appellate relief should not be granted to those who fail to comply with the rules. Those courts easing the impact of the rule do so primarily:

> where the undisputed evidence results in a verdict that is totally without legal support justice requires a new trial despite counsel's failure to move for a directed verdict prior to the submission of the case to the jury. . .

Oliveras v. American Export Isbrandtsen Lines, Inc., 431 F.2d 814, 817 (2d Cir. 1970).

In this case, the Ninth Circuit erroneously excused petitioner's procedural error and then characterized plaintiff's evidence of negligence as "substantial, if not overwhelming". The Ninth

Circuit erred in reviewing petitioner's claim in the first instance. That error will only be compounded if certiorari is granted.

B. OSHA Regulations

The trial court instructed the jury on the application of OSHA Regulations which had been admitted into evidence by agreement as follows:

INSTRUCTION NO. 14

> There are Federal regulations dealing with "Safety and Health Regulations for Longshoring" which apply to this case. The regulations provide in part as follows:
>
> When an edge of a hatch section or stowed cargo more than 8 feet high is so exposed that is presents danger of an employee falling, the edge shall be guarded by a safety net of adequate strength to prevent injury to a falling employee, or by other means providing equal protection under the existing circumstances.
>
> Although this regulation was enacted and intended to govern the conduct of the stevedore company as an employer, if you should find that the defendant here had notice of the violation, if any, of the regulation or that the defendant in the exercise of reasonable care should have had notice of such violation and that such violation was a proximate cause of the accident, then you may consider that fact along with all other evidence in the case in determining the liability of the defendant.

Contrary to petitioner's assertions, this instruction did not impose vicarious liability upon the shipowner but merely informed the jury of a standard of care which they could consider with all other evidence bearing on the issue of liability. The Ninth Circuit found this proper and consistent with 29 C.F.R. 1918.2, and Provenza v. American Export Lines, Inc., 324 F.2d 660 (4th Cir. 1963).

Bear in mind that the petitioner placed in evidence (without objection) a pamphlet containing all OSHA Regulations relating to longshoring but failed to propose any instruction to guide the jury in use of this exhibit. Petitioner excepted to the court's Instruction No. 14 and in its Motion for Judgment Notwithstanding the Verdict or for a New Trial asserted the court's Instructions No. 4 (plaintiff's contentions relating to OSHA Regulations), 14 and 15 "were wrong as a matter of law". In its opening brief to the Ninth Circuit, however, petitioner did not mention, let alone brief or argue court's Instruction No. 14.

> Rule 28(a), Federal Rules of Appellate Procedure, requires that the brief of the appellate shall include "a statement of the issues presented for review." Questions not raised, briefed or argued will ordinarily be given no consideration by an appellate court.

Trailmobile v. Whirls, 331 U.S. 40, 50, 67 S. Ct. 982, 91 L. Ed. 1328 (1947); Smith v. American Guild of Variety Artists, 368 F.2d 511, 514 (8th Cir. 1966)

The Ninth Circuit, we submit, overlooked this procedural lapse and reached the substantive question and affirmed the trial court. Petitioner obtained one appellate review it did not procedurally deserve. In this posture, certiorari should be denied.

CONCLUSION

We submit that the Petition for Writ of Certiorari should be denied on the grounds of procedural defects.

If the Supreme Court, like the Ninth Circuit, regards the procedural defects as excusable then we would join in the Petition for Writ of Certiorari.

This case presents to the Court three major issues arising under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act (a) standard of care, (b) OSHA Regulations, (c) pro rata attorneys' fees (which is the subject of a Petition in 79-850) which are in conflict in the circuits. We believe that the Ninth Circuit opinions, in this case and Santos v. Scindia Steam Navigation Co., 598 F.2d 480 (9th Cir. 1979) (petition for certiorari pending under 79-512), will prove to be the leading cases to which, in time, the other circuits will follow. We believe this because the Ninth Circuit decisions correctly analyze and intergrate legislative history and the decision of this court in Kemarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959). The tide is turning toward the sounder and better reasoned Ninth Circuit analysis. [See e.g. Johnson v. A/S Ivarans Rederi, (1st Cir. Jan. 11, 1979) No. 79-1118]. In view of the stated congressional desire for uniform application of the law

under the amendments to the Longshoremen's and Harbor Workers' Compensation Act, certiorari should be granted to resolve the conflicts in the circuits.

Respectfully submitted,

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